INDEX.

PETITION FOR A WRIT OF CERTIORARI 1

Opinions Below 1

Jurisdiction 2

Questions Presented 4

Statutes Involved 5

Statement 5

Specifications of Error to be Urgued 6

Reasons for Granting the Writ 6

Conclusion 7

BRIEF OF PETITIONER 9

The Facts 9

Specifications of Error to be Urged 10

Argument 11

I. G. C. 1275 either means a felony which is a felony under the laws of the state of Ohio as defined by statutes of the state of Ohio and for which penalty is imprisonment in a penitentiary of the state of Ohio or it is void and uncertain as to the meaning of the word "felony" 11

II. The plain meaning of G. C. 12372 refers to a penitentiary of the State of Ohio and only to crimes under the statutes of the State of Ohio 13

III. The revocation of the license of Julius Raab was, therefore, arbitrary, it having no statute to sustain it 17

IV. G. C. 13458-2 and the decisions of Ohio plainly show the policy of the State not to punish one for an act which is not an offense under the State statute and the Supreme Court could not change that policy 18

Conclusion 19
APPENDIX A: Statutes of Ohio Involved 20

TABLE OF AUTHORITIES.

Cases.

Browning v. State, 120 O. S. 62 ..... 11, 19
Canter's Will, In re, 261 N. Y. Supp. 872 16
Chicagoland Agencies v. Palmer, 2 N. E. 2d 910 13
Connally v. General Construction Co., 269 U. S. 385 12
Lanzetta et al. v. New Jersey, 306 U. S. 451 12
Leoken's Will, In re, 2 N. Y. Supp. (2d) 764 16
People v. Fisher, 261 N. Y. Supp. 390 16
People v. Love, 131 N. E. 809 17
Shelley v. Kraemer, 334 U. S. 1 17
State v. Davis, 8 Ohio Decisions 680 ..... 11, 19
Topis v. Board of Regents, 67 N. E. (2d) 245 16
Weathers, In re, 31 Southern (2d) 543 15

Constitution.

Constitution of the United States:
Amendment 14, Section 1 ..... 10, 12, 18, 19

Statutes.

General Code of Ohio:

Section 1275 ..... 3, 4, 5, 6, 10, 11, 13, 17, 18, 20
Section 2148-0 ..... 15, 21
Section 2148-1 ..... 15, 21
Section 2148-5 ..... 15, 21
Section 2148-8 ..... 15, 22
Section 2166 ..... 4, 14, 20
Section 12372 ..... 3, 4, 6, 10, 13, 14, 15, 17, 18, 20
Section 13455-1 ..... 4, 14, 20
Section 13458-1 ..... 5, 20
Section 13458-2 ..... 5, 6, 10, 18, 19, 21

28 U. S. C. 1257(3) 2

In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

JULIUS RAAB, M. D.,
Petitioner,

vs.

STATE MEDICAL BOARD OF THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio, entered in the above entitled case (under the caption in said Supreme Court of Ohio, In the Matter of Julius Raab, M. D., State Medical Board of the State of Ohio, Appellant, vs. Julius Raab, M. D., Appellee, No. 32304) on October 24th, 1951 and application for rehearing denied on November 7th, 1951.

OPINIONS BELOW.

First, there was an appeal from the State Medical Board of the State of Ohio from the revocation of the license of Julius Raab, M. D. to the Common Pleas Court of Cuyahoga County, Ohio. The Court of Common Pleas of Cuyahoga County, Ohio, announced no opinion, but entered judgment for Julius Raab, M. D., restoring Julius Raab to all of his rights and privileges for the practice of medicine and surgery (See Record, page 14).

The State Medical Board of the State of Ohio then appealed to the Court of Appeals of Cuyahoga County, Ohio, which affirmed the judgment of the Common Pleas Court, but also wrote no opinion (See Record, page 15).

A motion to certify was allowed to the Supreme Court of Ohio on the appeal of the State Medical Board of the State of Ohio. The Supreme Court of Ohio reversed the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, and affirmed the decision and order of the State Medical Board revoking the license of Julius Raab to practice medicine. The opinion of the Supreme Court of Ohio is reported in Volume 46 of Ohio Opinions, page 7, and also 156 Ohio State, and appears in the Record at pages 16 to 20 incl.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on October 24th, 1951 (Record, pages 24 and 25). The jurisdiction of this Court is invoked under 28 U. S. C. S. 1257 (3), and in accordance with the following

Statement of the Grounds.

The petitioner, Julius Raab, M. D., who was licensed by the State of Ohio to practice medicine, was convicted in the District Court of the United States, Northern District of Ohio, and sentenced for evasion of income tax; he paid all of the income tax and penalties and suffered a sentence in the Federal Penitentiary in Pennsylvania.

On the sole ground that the conviction in the United States District Court was ground for revocation of his certificate, his license was revoked, and his right to practice terminated. The essential part of the statute under which this revocation was had reads as follows:

Section 1275. GROUNDS FOR REFUSAL TO GRANT AND REVOCATION OF CERTIFICATE.

"The state medical board may refuse to grant a certificate to a person * * * at any time guilty of felony * * *."

REVOCATION OF CERTIFICATE.

"Upon notice and hearing, the board, by a vote of not less than five members, may revoke or suspend a certificate for like cause or causes."

The Common Pleas Court held that the term "felony" in the statute quoted meant a crime under the laws of the State of Ohio punishable by imprisonment in the Ohio Penitentiary and that, therefore, there was no ground to revoke the license of Julius Raab, M. D.

The Court of Appeals affirmed the judgment of the Court of Common Pleas.

The Supreme Court of Ohio held that the offense for which Julius Raab was convicted, though a Federal offense only and punishable elsewhere than a penitentiary of the State of Ohio, was a ground of revocation. It is to be observed, as will be elaborated in the brief, that Ohio has only statutory felonies and that the definition of a "felony" under the Ohio statute, G. C. 12372, is:

"Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies * * *."

Until the Supreme Court of Ohio ruled, no constitutional question existed. When the Supreme Court disregarded the meaning of the term "felony" in the Ohio Statutes, the term of which meant felonies as defined by the Statutes of Ohio for which the punishment is imprisonment in the Ohio penitentiary, and held that imprisonment elsewhere than in Ohio and for offenses under the Federal law was included, there was for the first time

error since the decision of the Supreme Court denied Julius Raab, M. D., the petitioner here, the equal protection of the laws and deprived him of life, liberty or property without due process of law in violation of Amendment 14 of the Articles of the Constitution of the United States. He was, by the decision of the Supreme Court, deprived of his livelihood as a trained and experienced physician and surgeon, contrary to his rights under the Amendment and Constitution aforesaid.

Upon the announcement of the decision of the Supreme Court which was contrary to the established law of the State of Ohio and the requisite of constitutional law, an application for re-hearing on constitutional grounds was made. (Record pages 20 and 20 to 23, denied page 25.)

QUESTIONS PRESENTED.

The denial of due process results from the fact that if G. C. 1275, which uses the term "felony," does not refer only to offenses which are felonies under the laws of the State of Ohio and punishable by imprisonment in the penitentiary of the State of Ohio, then the law is indefinite and does not define the term "felony."

On the other hand, if the term "felony" in G. C. 1275 is made definite by inclusion therein of G. C. 12372 quoted above, then the Supreme Court of Ohio has disregarded the law of the State of Ohio, since G. C. 2166 states:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration * * *."

and G. C. 13455-1 states:

> "A person sentenced for felony to the penitentiary * * * shall be conveyed to the penitentiary * * *

by the Sheriff of the county in which the conviction was had * * *."

and plainly indicate that offenses which are not felonies under the Statutes of Ohio are not felonies within G. C. 1275. Thus the judgment of the Court below was arbitrary and our brief will so show.

Furthermore, G. C. 13458-1 and 13458-2 provide for the effect of conviction of a felony. The first provides for persons convicted of a felony in this state and the other for crimes outside of the state. They both recognize that there can be no felony unless the act be a crime punishable by the laws of this state by imprisonment "in the penitentiary."

They both provide that the conviction shall render the person "incompetent to be an elector or juror, or to hold an office of honor, trust or profit."

Thus a man may be elected to office in Ohio though convicted of a federal felony, as long as the act is not a felony punishable under the Ohio Statute. Since this is so, a physician, a lesser position, should, therefore, likewise be entitled to practice.

Thus under the decision of the Supreme Court Julius Raab is denied the equal protection of the law.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A.

STATEMENT.

The facts are so simple and as they are already given there is no need to repeat what we have said under the above headings and they may be deemed repeated so far as they are statements of fact.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of Ohio erred:

1. In holding that under G. C. 1275 are included violations of a federal criminal statute, the penalty for which violation is imprisonment in a federal penitentiary.
2. In disregarding the plain meaning of G. C. 12372 which can only refer to a penitentiary of the State of Ohio and only to crimes under the Statutes of the State of Ohio.
3. In arbitrarily causing the revocation of a license of Julius Raab, M. D., when the Statute plainly does not authorize it.
4. In disregarding G. C. 13458-2 and the decisions of Ohio under which the policy of the State is not to punish one for an act which is not an offense under the State Statutes.

REASONS FOR GRANTING THE WRIT.

1. G. C. 1275 was found by the Common Pleas Court and the Court of Appeals to include only offenses which are felonies under the State Statutes of Ohio and the imprisonment for which is in the penitentiary of the State of Ohio. It is therefore plain that either there is an uncertainty in that statute which makes it void as there is no guide, or the Supreme Court was arbitrary in its decision.

2. It is not within the province of a State Court by construction to make an act punishable by revocation of a license or otherwise when that act has not by the legislature been so made punishable, just because it believes the law should have been made to include the act at bar.

This encroachment of the Supreme Court of Ohio on the constitutional rights of Julius Raab is serious and substantial. It leads, if unrebuked, to a power in Courts to

enlarge criminal and penal statutes and to make the federal law cover in a sphere to which it has not been extended.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

M. L. BERNSTEEN,
Counsel for Petitioner.

BERNSTEEN & BERNSTEEN,
A. E. BERNSTEEN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

JULIUS RAAB, M. D.,
Petitioner,

vs.

STATE MEDICAL BOARD OF THE STATE OF OHIO,
Respondent.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI.

THE FACTS.

Julius Raab, M. D., was licensed by the State of Ohio to practice medicine and was convicted in the District Court of the United States, Northern District of Ohio, and sentenced for evasion of income tax; he paid all of the income tax and penalties and suffered a sentence in the Federal Penitentiary in Pennsylvania.

To pay the income tax he had to pledge all of his property, insurance and make loans.

Apart from this misstep he was of good character and a competent and industrious physician.

On the sole ground that the conviction in the United States District Court was ground for revocation of his certificate, his license was revoked and his right to practice terminated; the Common Pleas Court of Cuyahoga County set aside the decision of the State Medical Board of Ohio. The Court of Appeals of Cuyahoga County affirmed the

judgment of the Court of Common Pleas, but on appeal by the State Medical Board of Ohio to the Supreme Court of Ohio, the judgment of the Common Pleas Court and the Court of Appeals were reversed and the decision of the State Medical Board of Ohio affirmed. Upon the judgment of the Supreme Court of Ohio being announced, an application for re-hearing was filed because the judgment of the Supreme Court of Ohio was in disregard of the Constitution, Amendment 14, Section 1. This application for rehearing was denied whereupon petition for writ of certiorari is filed.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of Ohio erred:

1. In holding that under G. C. 1275 are included violations of a federal criminal statute, the penalty for which violation is imprisonment in a federal penitentiary.
2. In disregarding the plain meaning of G. C. 12372 which can only refer to a penitentiary of the State of Ohio and only to crimes under the Statutes of the State of Ohio.
3. In arbitrarily causing the revocation of a license of Julius Raab, M. D., when the Statute plainly does not authorize it.
4. In disregarding G. C. 13458-2 and the decisions of Ohio under which the policy of the State is not to punish one for an act which is not an offense under the State Statutes.

ARGUMENT.

It is not the purpose of this brief to repeat the complete brief of the petitioner before the Supreme Court of Ohio. It is the desire to point out, however, that the Supreme Court of Ohio, in its desire to deprive Julius Raab, M. D., of his rights to practice as a physician, went beyond its powers and disregarded the plain meaning of Statutes and established law of Ohio. We will show how the Supreme Court of Ohio grasped at straws to arrive at the decision it did and we will take up each error separately.

I. G. C. 1275 either means a felony which is a felony under the laws of the state of Ohio as defined by statutes of the state of Ohio and for which penalty is imprisonment in a penitentiary of the state of Ohio or it is void and uncertain as to the meaning of the word "felony."

If it does not have a definition by statute and law of the State of Ohio, then it is uncertain since an act might be a felony in one State and not in another.

Assume a situation as is revealed in 120 O. S. 62, *Browning vs. State,* or *State vs. Davis,* 8 Ohio Decisions 680, we would have a situation where two men would be differently treated depending on where a crime was committed. Thus the physician who committed, what was a misdemeanor in Ohio, in another State, where it was a felony, would not be permitted to practice; yet if there was a misdemeanor in the other state but a felony in the State of Ohio he would be permitted to practice in Ohio. Likewise if a man were charged in the Federal Court where the act was a misdemeanor whereas if charged in the State of Ohio it would be a felony, he would be permitted to practice because the charge is filed in the District Court instead of the State Court.

Such a variety of results could not be the intention of the legislature. If there is a conviction for an act which under the Ohio law would be a felony, then, of course, such act would be a ground for revocation of the license and thus uniformity would be assured.

This situation cannot exist for if it did we would have a situation denounced by the Supreme Court of the United States and Courts elsewhere; that a law is unconstitutional when it is vague and uncertain and has no guide. We quote the following cases in support of this principle:

> In 306 U. S. 451, *Lanzetta et al. v. New Jersey,* it was held, that an Act punishing any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other state, is declared to be a gangster * * *. Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years or both, was repugnant to the due process clause of the Fourteenth Amendment, because of its vagueness and uncertainty.
>
> Page 453: No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Construction Co.,* 269 U. S. 385, 391: That the terms of a penal statute creating a new offence must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

2 N. E. 2d 910, *Chicagoland Agencies v. Palmer*:

> Syl. 4: An Act, to be valid, may not be vague, indefinite, and uncertain, but must be complete when it leaves Legislature and be sufficiently explicit to advise everyone what his rights are under it and how he will be affected by its operation.
>
> Syl. 5: Courts may not undertake by judicial construction to supply omissions and cure defects in statute in respect to matters which are within the legislative sphere, for to do so would be violative of constitutional provision providing for separation of powers.

It therefore follows that G. C. 1275 alone in its use of the term "felony" does not make a valid law as a basis for revocation of the license of Julius Raab, M.D. Both the Attorney General of the State of Ohio and the Supreme Court of the State of Ohio were conscious that they had to include the definition of G. C. 12372 to make G. C. 1275 valid. We will show, however, that they did not actually include the definition of G. C. 12372 in arriving at the decision to take away the license of Julius Raab, M.D.

II. The plain meaning of G. C. 12372 refers to a penitentiary of the State of Ohio and only to crimes under the statutes of the State of Ohio.

The Attorney General conceded this as did the Supreme Court of Ohio,

> "The term 'felony' is not defined in the Medical Practice Act. However, the General Assembly did provide a definition in the general provisions of the Code relating to the penal laws of the State."

and the Attorney General then quoted G. C. 12372, a material part of which is:

> "Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies * * *."

The Attorney General then argues that the definition found in Section 12372 is the definition of felony as found in the Medical Practice Act. The Attorney General further stated that Section 12372 of the General Code did not provide "that imprisonment must be in a penal institution in this state."

We submit that the Attorney General has misunderstood the language in G. C. 12372. He reads it as if it said "in a penitentiary" whereas it is "in the penitentiary," referring of course to a particular penitentiary, the Ohio penitentiary.

General Code 2166 states:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. * * *."

General Code 13455-1 reads:

> "A person sentenced for felony to the penitentiary * * * shall be conveyed to the penitentiary * * * by the Sheriff of the county in which the conviction was had. * * *."

Thus showing that the felonies referred to are felonies defined by the Statutes of Ohio for which the punishment is imprisonment in the Ohio penitentiary.

The Supreme Court of Ohio, however, sought to escape inexorable logic of petitioner's argument by creating a definition of the term "in the penitentiary" which was not grounded on the Statutes of Ohio or its decisions. It must be remembered that Ohio has no crimes except such as are defined by Statutes. This is the way the Supreme Court of Ohio sought to evade the plain meaning of the term "in the penitentiary" as meaning an Ohio penitentiary. It said women and children are not sent to the penitentiary and, therefore, penitentiary means any peni-

tentiary anywheres. This is not logic but an escape from reality. It is to be remembered that G. C. 12372 goes back to 1815 when both men and women were sent to the penitentiary and there was no such thing as a reformatory for women or a separate penitentiary for women. In 1915 there was passed a law G. C. 2148-0-1-5-8 under which there was established an institution to be known as an Ohio reformatory for women and a girls industrial school and it was provided that female prisoners shall be transferred from the Ohio penitentiary and that in the future they would be sentenced to these institutions so created. They were no less penitentiaries of Ohio and no reason for holding that the old law G. C. 12372 existing since 1815 meant any penitentiary anywhere though not in Ohio. Certainly G. C. 12372 dealt only with offenses made such by the Statutes of Ohio and there was no basis for the claim of the Supreme Court of Ohio taking away the meaning of the word "in the penitentiary" as meaning an Ohio penitentiary just because by later act there were different places of confinement, in reality, however, the penitentiary in Ohio for women.

Thus the Supreme Court of Ohio disregarding the plain meaning of G. C. 12372 produced a result which was contrary to decisions in any State where conviction in Federal Courts was sought to be ground for revoking licenses of physicians and others. We refer to a few of those cases:

See: 31 Southern (2d) 543, *In re Weathers* (Florida 1947):

> Syllabus 1: "A physician's conviction in federal Court for mailing nonmailable matter in violation of federal statute was not conviction of offense constituting felony under state laws and hence not ground for revocation of his license to practice medicine by State Board of Medical Examiners."

Syllabus 2: "A board or officer, granted power to revoke licenses for certain reasons, causes or crimes set out in statutes, may not revoke license for any other or different cause not clearly within statutory provisions."

261 N. Y. Supp. 390, *People v. Fisher*:

Syllabus 1: "Offenses, conviction for which will automatically deprive physician of right to practice, in foreign jurisdiction, held limited to felony embracing offenses which would constitute felony if committed in New York." (Statute does not say any court.)

261 N. Y. Supp. 872, *In re Canter's Will*:

Syllabus 2: "Conviction for single criminal offense of conspiracy to defraud United States held not to disqualify nominee as executor by reason of 'dishonesty' where no other acts of dishonesty were proved."

Syllabus 3: "Conviction in Federal Court for felony held not to disqualify nominee from acting as executor under state statute disqualifying 'felon,' where offense was not felony under state law."

In 67 N. E. (2d) 245, *Topis v. Board of Regents*, the felony had to be one which would be a felony under New York Law and not merely under Federal Law—Revocation of certificate to practice medicine for guilt in Federal Court in prescribing morphine sulphate etc.—a mere misdemeanor—under New York Law, reversed.

2 N. Y. Supp. (2d) 764, *In re Leoken's Will*:

Syllabus 1: "A person convicted in another jurisdiction of a crime which is there a felony is not guilty of a 'felony' within Penal Law, and consequently such person is not a 'felon' within Surrogate's Act so as to be incompetent to receive letters testamentary."

Therefore the act for which Doctor Raab was convicted in the Federal Court was not a felony under General Code 1275 within the meaning of the legislature.

It, therefore, follows that Dr. Julius Raab was not guilty of a felony within the meaning of G. C. 1275 when considered with the appropriate Ohio Statutes.

III. The revocation of the license of Julius Raab was, therefore, arbitrary, it having no statute to sustain it.

No one can deny that just because Julius Raab, M.D., had a license to practice that, therefore, such license was not within the constitutional provisions of the United States.

In 131 N. E. 809, *People vs. Love*, it is stated:

> Syllabus 2: "A person's business, profession or occupation is property within constitutional provisions as to due process of law and right to liberty and pursuit of happiness."

It is further stated in authorities which could be given, if necessary, that the right to pursue a lawful calling, business or profession cannot arbitrarily be taken away by statute, or Courts.

It is also established in 334 U. S. 1, *Shelley vs. Kraemer*:

> "The actions of state courts and judicial officers in their official capacities are actions of the states within the meaning of the Fourteenth Amendment."

and on page 14 of that case, it is stated that this language is long established by the decisions of the Supreme Court.

When the Supreme Court of Ohio admitted as did the Attorney General that the definition of "felony" in G. C. 1275 was to be found in G. C. 12372, it could not disregard the meaning of "felony" in G. C. 12372 and we submit

that the definition of "felony" in G. C. 12372 does not include a felony under the Federal Law. Therefore, despite the mere pretense of following G. C. 12372 and giving it a construction which, by no stretch of imagination it could have, the Supreme Court of Ohio was acting arbitrarily, and whenever a Court acts arbitrarily, its judgment is no judgment and is an unconstitutional act which will be set aside under the constitutional provisions

1. in violation of Amendment XIV of the Articles of the Constitution of the United States, in that it deprives him of his livelihood as a trained and experienced physician and surgeon, contrary to his rights under the amendment and constitution reading "nor shall any State deprive any person of life, liberty, or property without due process of law";
2. in violation of the same amendment, denied him the equal protection of the laws, contrary to his rights under said amendment reading "nor shall any State * * * deny any person within its jurisdiction the equal protection of the laws."

IV. G. C. 13458-2 and the decisions of Ohio plainly show the policy of the State not to punish one for an act which is not an offense under the State statute and the Supreme Court could not change that policy.

If it were true that G. C. 12372 meant "any penitentiary" though not of Ohio, then the Criminal Code of Ohio with all its statutory definitions of Crime would fail, for then any crime of the Federal law or any crime in any State in the Union would be within the jurisdiction of the Courts of Ohio, which just cannot be. No, the Supreme Court of Ohio cannot create such a situation, so as to encompass Julius Raab's conviction in the United States Court under G. C. 1275 by this method.

The Supreme Court of Ohio could not single out Julius Raab and make a different rule apply to him. Under the statutes of Ohio every office, privilege, or right, including that of a physician and surgeon, are subject to the same test. The test is not the accident of a penitentiary sentence in a state other than Ohio, but the act must be an act which would be punishable under the Criminal Code of Ohio as a felony as defined by the Ohio Statutes. Such a discrimination violates the Constitution of the United States. (See 120 O. S. 62, *Browning v. State*, and *State v. Davis*, 8 O. Dec. 680, and above.)

How can the Supreme Court of Ohio disregard G. C. 13458-2, which is a plain guide—it states that it is not enough that a person be imprisoned in the penitentiary of another State, but that the crime for which the person has been sentenced and there imprisoned be for a crime punishable by the laws of Ohio, and clearly the act of Julius Raab was not so punishable.

Nor can the language of G. C. 13458-2 be twisted into a claim that a Federal court sentence under a Federal Statute, is a sentence for a crime under the criminal statutes of the State of Ohio, when it is not punishable thereunder.

CONCLUSION.

We submit that there is plainly a constitutional question under the Fourteenth Amendment and that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

M. L. BERNSTEEN,
Counsel for Petitioner.

BERNSTEEN & BERNSTEEN,
A. E. BERNSTEEN,
Of Counsel.

APPENDIX A.

STATUTES OF OHIO INVOLVED.

General Code 1275. GROUNDS FOR REFUSAL TO GRANT AND REVOCATION OF CERTIFICATE.

"The state medical board may refuse to grant a certificate to a person * * * at any time guilty of felony * * *."

REVOCATION OF CERTIFICATE.

"Upon notice and hearing, the board, by a vote of not less than five members, may revoke or suspend a certificate for like cause or causes."

General Code 12372.

"Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies * * *."

General Code 2166.

"Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration * * *."

General Code 13455-1.

"A person sentenced for felony to the penitentiary * * * shall be conveyed to the penitentiary * * * by the Sheriff of the county in which the conviction was had * * *."

General Code 13458-1.

"A person convicted of a felony in this state, unless his conviction is reversed or annulled, shall be incompetent to be an elector or juror, or to hold an office of honor, trust or profit * * *."

General Code 13458-2.

"A person who has been imprisoned in the penitentiary of any other state of the United States, under sentence for the commission of a crime punishable by the laws of this state by imprisonment in the penitenary, is incompetent to be an elector or juror, or hold an office of honor, trust or profit within this state unless he has received a pardon from the Governor of the state in which he was imprisoned."

General Code 2148-0.

"That there be established an institution to be known as the Ohio Reformatory for women."

General Code 2148-1.

"The Ohio reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of felony, as hereinafter provided, and for the detention of such female prisoners as shall be transferred thereto from the Ohio penitentiary and the girls' industrial school as hereinafter provided, except that no female convicted of a violation of an ordinance of a municipal corporation shall be sentenced to or detained in said reformatory."

General Code 2148-5.

"All female persons over sixteen years of age, convicted of felony, except murder in the first degree without the benefit of recommendation of mercy, shall be sentenced to the Ohio reformatory for women in the same manner as male persons are now sentenced to the Ohio state reformatory. And in so far as applicable, the laws relating to the management of the Ohio state reformatory and the control and management thereof, shall apply to the Ohio reformatory for women."

General Code 2148-8.

"Upon the issuance of the proclamation hereinbefore provided for relating to felons the governor shall issue an order to the warden of the Ohio penitentiary to convey and deliver to the Ohio reformatory for women all females in his legal custody, except any who may be convicted of murder in the first degree, without recommendation for mercy * * *."

INDEX.

Opinions below 1
Jurisdiction 2
Statutes involved 2
Statement 2
Argument 3
I. Actual errors specified 3
II. Rules of decision in state courts 5
III. Is the action of the state of Ohio arbitrary or a denial of due process? 6
IV. Is the action of the state of Ohio a denial of equal protection of the law? 7
Conclusion 8

Cases Cited.

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S., 495, 92 L. Ed., 99, 68 Supreme Court, 165 5

Erie Railroad Co. v. Tompkins, 304 U. S., 64, 82 L. Ed., 1188, 58 Supreme Court, 817, 114 A. L. R., 1487 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 519.

JULIUS RAAB,

Petitioner,

vs.

STATE MEDICAL BOARD OF OHIO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio (R., 16-20) is reported in 156 Ohio St., 158. In the inferior Ohio courts the case was decided without opinion (R., 14-15).

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this court under Title 28, Section 1257(3), urging that the decision of the state court is violative of the due process and equal protection requirements of the United States Constitution.

STATUTES INVOLVED.

The pertinent provisions of the Ohio statutes involved are set out in the petition at pp. 20-22.

STATEMENT.

The petitioner, Julius Raab, licensed by the state of Ohio to practice medicine, was convicted in the District Court of the United States, Northern District of Ohio, and sentenced to a term of imprisonment for evasion of the federal income tax laws. This sentence of imprisonment was served by the petitioner.

The State Medical Board of Ohio, acting under authority of a state statute which authorized revocation of a medical practitioner's license upon proof that the licensee was "at any time guilty of felony," took administrative action against the petitioner which culminated in the revocation of his right to practice medicine in Ohio.

The adjudication order thus made by the administrative agency was appealed to the Common Pleas Court of Cuyahoga county, Ohio, where the order of the agency was reversed. In the Court of Appeals of Cuyahoga county, Ohio, the action of the Common Pleas Court was affirmed, but on appeal by the State Medical Board of Ohio to the Supreme Court of Ohio the judgments of the inferior courts were reversed and the adjudication order of the State Medical Board was affirmed.

ARGUMENT.

The argument of the respondent may be summarized by pointing out that the petitioner has applied for a writ of certiorari under the provisions of Title 28, Section 1257(3), United States Code, but has failed, in stating the specifications of error to be urged, to draw attention to any error comprehended by the provisions of this statute. He has, instead, drawn attention only to certain supposed errors of the Supreme Court of Ohio in the interpretation of certain Ohio statutes. This court does not, of course, review such rules of decision; it not only accepts but is bound by the construction given to state statutes by the state courts.

I.

Actual Errors Specified.

Although the petitioner in stating the grounds (Petition, p. 4) upon which the jurisdiction of this court is invoked, makes a claim of denial of due process and equal protection. it is nevertheless apparent from the nature of the errors specified that he is actually complaining that the state court erred in the interpretation of the state statute. Nowhere in the petition or in the brief in support of such petition is there a statement that the statute, so interpreted, would effect a denial of due process or equal protection. For the sake of convenience in considering this point, the errors actually specified by the petitioner (Petition, p. 6) are here repeated:

> "The Supreme Court of Ohio erred:
>
> 1. In holding that under G. C. 1275 are included violations of a federal criminal statute, the penalty for which violation is imprisonment in a federal penitentiary.

2. In disregarding the plain meaning of G. C. 12372 which can only refer to a penitentiary of the state of Ohio and only to crimes under the statutes of the state of Ohio.

3. In arbitrarily causing the revocation of a license of Julius Raab, M.D., when the statute plainly does not authorize it.

4. In disregarding G. C. 13458-2 and the decisions of Ohio under which the policy of the state is not to punish one for an act which is not an offense under the state statutes."

As to the first two errors specified, it is impossible that more than one view could be entertained as to their nature. Both are questions of purely statutory construction.

In the third specification of error, the petitioner complains that the state court's decision was arbitrary. Again, however, the complaint is based not on a claim that a statute which would permit the revocation of petitioner's license following conviction of a crime amounting to a felony under the laws of the United States, would be invalid under the federal Constitution, but instead the decision of the state court is classified as arbitrary solely because the state court has misconstrued the meaning of the statute.

In the fourth specification of error a complaint is made that certain Ohio statutes and decisions have established a supposed policy of the state not to "punish" an individual for an act which is not an offense under the Ohio statutes. Again, there is no claim, in this specification of error, that the effect of these statutes, construed as they have been by the Supreme Court of Ohio in this case, would be violative of the equal protection requirement of the United States Constitution. Rather the claimed error is based solely on the proposition that the state court erroneously construed a state statute.

II.

Rules of Decision in State Courts.

Since the decision in **Erie Railroad Company v. Tompkins**, 304 U. S., 64, 82 L. Ed., 1188, 58 Supreme Court, 817, 114 A. L. R., 1487, this court has consistently held that in matters of statutory construction the interpretation given to state statutes by the highest judicial tribunal of the state would not be questioned in this court.

In **Aero Mayflower Transit Co. v. Board of Railroad Commissioners**, 332 U. S., 495, 92 L. Ed., 99, 68 Supreme Court, 165, we find the following statement by Mr. Justice Rutledge, who delivered the opinion of the court:

> "We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of their literal import. The rule is too well settled to permit of question that this court not only accepts but is bound by the construction given to state statutes by the state courts."

In a footnote there are cited in support of this statement the following decisions:

> "Louisiana ex rel. Francis v. Resweber, 329 US 459, 91 L ed 422, 67 S Ct 374; Huddleston v. Dwyer, 322 US 232, 88 L ed 1246, 64 S Ct 1015; Minnesota ex rel. Pearson v. Probate Ct., 309 US 270, 84 L ed 744, 60 S Ct 523, 126 ALR 530; Morehead v. New York, 298 US 587, 80 L ed 1347, 56 S Ct 918, 103 ALR 1445. Cf. Erie R. Co. v. Tompkins, 304 US 64, 82 L ed 1188, 58 S Ct 817, 114 ALR 1487."

It would plainly appear, therefore, that to the extent that the errors here complained of are solely questions of supposed error on the part of the state court in interpreting the meaning of a state statute, this court, accepting

the state courts' ruling as a rule of decision, will be in no position to correct such supposed errors of interpretation. Respondent is of the opinion that none of the specifications of error set out by petitioner actually complain of anything other than errors in statutory interpretation and in these circumstances passing references to arbitrary action, denial of due process, or denial of equal protection would not be sufficient to invoke the jurisdiction of this court on certiorari.

III.

Is the Action of the State of Ohio Arbitrary or a Denial of Due Process?

Assuming that this court should be of the opinion that petitioner has properly complained in the specifications of error set out in the petition that due process of law has been denied him, the plain facts of record herein by no means are sufficient to justify such a contention. The plain facts of record are that the petitioner was afforded every right of due process by the state of Ohio. This was done in a hearing before an administrative agency and the adjudication order there made was three times reviewed in Ohio by judicial tribunals. In none of these tribunals was he denied the right to be heard and to present his case fully. The principal question involved in each of these tribunals was the proper interpretation of the word "felony," as used in the state statute.

In this view of the matter, it is apparent that the petitioner is seeking in this court merely a fourth judicial review on a question of statutory construction and that in doing so he has failed entirely to point out wherein due process of law was denied him in the state courts.

The petitioner designates the action in the Supreme Court of Ohio as "taken arbitrarily." There is nothing whatever in the record herein, and certainly nothing in the opinion of the Supreme Court of Ohio, which would indicate that the rule of decision there announced is not to be uniformly applied to all licensees under the Ohio Medical Practice Act. The fact that the rule thus announced by the Supreme Court of Ohio is the initial pronouncement by such court on the point of law here involved need have no bearing on the matter. Litigants are always prone to regard as arbitrary any such initial pronouncement on a subject by a judicial tribunal simply because they are the first persons to be affected by it. This fact, however, cannot amount to a denial of due process or to arbitrary action since it is necessary in the normal course of jurisprudence that courts will from time to time entertain controversies involving legal questions of first impression therein.

IV.

Is the Action of the State of Ohio a Denial of Equal Protection of the Law?

Petitioner has pointed out what is claimed to be the established policy of the state under Section 13458-2, General Code of Ohio, that Ohio citizens are not denied certain civil rights because of conviction of crime in another state where such crime is not punishable under Ohio law by imprisonment in the penitentiary. This is hardly a situation analogous to that at hand. The right to practice medicine is not an absolute, unqualified or natural right but is subordinate to the police power of the state. Regulation of the practice of medicine is a proper subject of the police

power of the state primarily because such regulation is required for the protection of the people against ignorance, incapacity, deception and fraud. The relationship of physician and patient is a particularly intimate one and one which involves not only the health of the patient concerned, but his life as well. In these circumstances it can hardly be contended that different standards and qualifications might not constitutionally be applied in the case of physicians than those which are applicable in the case of persons holding civil office. Such a distinction, if any there is in Ohio, would appear to be plainly within the discretion of the state legislature.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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13

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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 519.

JULIUS RAAB, M. D.,
Petitioner,

vs.

STATE MEDICAL BOARD OF THE STATE OF OHIO,
Respondent.

REPLY BRIEF OF PETITIONER.

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TABLE OF AUTHORITIES.

Cases Cited or Distinguished.

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 2

Connelly v. General Construction Co., 269 U. S. 385 4

Erie Railroad Co. v. Tomkins, 304 U. S. 64 2

Huddleston v. Dwyer, 322 U. S. 232 3

Lanzetta et al. v. New Jersey, 306 U. S. 451 4

Louisiana ex rel. Francis v. Resweber, 329 U. S. 459 3

Minnesota v. Probate Court, 309 U. S. 270 2

Morehead v. New York, 298 U. S. 587 2

Constitution.

Constitution of the United States, Amendment XIV.. 1, 4

Statute.

Ohio General Code, Section 1275 4

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JULIUS RAAB, M. D.,

Petitioner,

vs.

STATE MEDICAL BOARD OF THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONER.

The petitioner files the within brief in reply to the brief of the respondent in the instant action.

The respondent asserts that there is no claim in petitioner's specification of errors that the effect of certain Ohio statutes and decisions, construed as they have been by the Supreme Court in Ohio, would be violative of the equal protection requirement of the United States Constitution and then cites certain decisions of the United States Supreme Court, which the respondent urges are authority for the proposition that the interpretation given the statutes by the highest judicial tribunal of the state would not be questioned by this Court.

By reference to pages 17 and 18 of petitioner's brief it is definitely set forth that the petitioner was deprived of his livelihood in violation of Amendment XIV of the Articles of the Constitution of the United States.

Petitioner further claims that the cases referred to and cited by the respondent are not in point or analogous to the situation in the instant action.

The case of *Erie Railroad Co. v. Tomkins*, 304 U. S. 64, involved simply the question whether the common law rule as declared by the highest court of the State of Pennsylvania should apply in an action for injuries sustained by a person walking upon the railroad, or whether the federal court, in which the action was filed, should disregard that rule and exercise an independent judgment as to what the common law rule of the state of Pennsylvania is or should be. The decision of the Supreme Court was that the common law rule as declared by the highest court of the state in which the injury occurred should apply. There was no question of statutes or statutory law involved in the case.

The case of *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U. S. 495, was an appeal from a judgment of the Supreme Court of Montana in a suit to restrain defendant from operating its motor vehicles over the state highways until certain provisions of the Montana Motor Carrier Act would be complied with. While this case challenged the validity of the commerce clause of Montana taxes, there was no violation of the Constitutional Rights of an individual under the Fourteenth Amendment.

The case of *Morehead v. New York*, 298 U. S. 587, was a habeas corpus case, the relator, a manager of a laundry, being indicted for failing to obey the orders of the state industrial commission, the latter having prescribed minimum wages for women employees. This case also in no way affected the liberty of a person under the Fourteenth Amendment.

The case of *Minnesota v. Probate Court*, 309 U. S. 270, was an appeal from a judgment quashing a writ of prohibition commanding the Probate Court to desist from pro-

ceeding against him as a "psychopathic personality." A proceeding had been brought in the Probate Court for the commitment of the appellant and an order for his production and examination had been issued.

The case of *Huddleston v. Dwyer,* 322 U. S. 232, was to review a judgment granting a writ of mandamus to compel a tax levy for the payment of overdue local improvement benefit assessments on property and to compel a tax levy for the payment of overdue assessments. The question before the Supreme Court was whether the judgment of the Circuit Court of Appeals should be vacated and the case remanded so that court could reconsider its decision in the light of later decisions in the State Court of Oklahoma. This case did not involve the liberty and life of an individual under the Fourteenth Amendment.

The case of *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, was one involving the question whether a person had been twice put in jeopardy for life and liberty,—his electrocution not having been carried out on account of a mechanical defect, and thereafter a second electrocution was ordered. This case did not violate the equal protection clause of the Fourteenth Amendment.

In the instant case the petitioner, Dr. Raab, was convicted by the Federal Court in the Northern District of Ohio for evasion of income tax and was sentenced to a Federal Penitentiary. The crime for which he was convicted was not a felony under the laws of the State of Ohio. By reason of that conviction the State Medical Board had his license revoked and his right to practice terminated. This was clearly a violation of the Equal Protection Clause of the Fourteenth Amendment.

It is to be noted that counsel for the respondent have not commented or referred to any of the cases cited in

petitioner's original brief. Such cases as they cited, and which we have commented on in the preceding paragraphs, involve in the main violations of some rule of procedure and not to statutory interpretations.

The construction of Section 1275, General Code of Ohio, as given by the Supreme Court of Ohio makes any person within the jurisdiction of the Courts of Ohio, who has been found guilty of any felony by any of the other States of the Union or the United States Courts, although the act committed was not a felony in Ohio (in which state all crimes are statutory), subject to the same penalty as if the crime committed was a felony in this state. Such an interpretation is a violation of the Equal Protection Clause.

Your petitioner further asks this Court to read the cases cited in his original brief:

306 U. S. 451, *Lanzetta et al. v. New Jersey,* where a statute was held repugnant to the due process clause of the Fourteenth Amendment because of vagueness and uncertainty; and

269 U. S. 385, *Connelly v. General Construction Co.,* holding the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties; and where a statute is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application there is a violation of the first essential of due process of law.

Your petitioner, therefore, respectfully submits that he is entitled to and has the right to invoke the jurisdiction of this Court on writ of certiorari.

Respectfully submitted,

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